

TRIBAL CONSULTATION OVERVIEW AND GUIDELINES



On November 5, 2009, President Obama expanded on decades of forward movement in the practice of Tribal Consultations by holding a historic meeting with tribal leaders from across the United States where he promised to improve the partnership between the federal government and Native nations. As an initial step toward fulfilling this commitment, the President issued an Executive Memorandum that directed all federal agencies to develop a plan within 90 days to consult and coordinate with tribal governments under President Clinton's Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments."¹

The unique government-to-government relationship requires thoughtful communication and careful planning to ensure the protection of both the sovereignty of Native nations and their people as well as the individual rights of Native people as United States citizens under the United States constitution.

What is a Tribal Consultation?

Tribal Consultation is an enhanced form of communication that emphasizes trust, respect, and shared responsibility. It is an open and free exchange of information and opinion between tribal governments and non-tribal agencies which leads to mutual understanding and comprehension. Tribal Consultations are ongoing conversations to establish and maintain a positive government-to-government relationship and an opportunity for tribes to provide *meaningful* and *timely* input on issues that may have a *substantial direct effect* on them or their members.²

Tribal Sovereignty

Tribal governments are an important and unique member of the family of American governments. The U.S. Constitution recognizes that tribal nations are sovereign governments, just like Canada or California.

Sovereignty is a legal word for an ordinary concept—the authority to self-govern. Hundreds of treaties, along with the Supreme Court, the President, and Congress, have repeatedly affirmed that tribal nations retain their inherent powers of self-government.³

What is the purpose of a Tribal Consultation?

Tribes are sovereign nations, meaning they have the full right and power of a governing body over themselves.

A Tribal Consultation is held to

- ensure the inclusion of federally recognized tribes in decision-making processes for actions by non-tribal entities that may affect the tribes or their members.
- form a relationship that leads to the exchange of information, mutual understanding, and informed decision-making.
- engage in open, continuous, and meaningful communication.⁴

While most state and local agencies are not required to consult with tribes in their locality, conducting a tribal consultation in the right way may benefit both the agency and the tribal nation when a decision impacts the tribe and their people in any way.

Why should law enforcement agencies hold Tribal Consultations?

Above all, law enforcement agencies should hold Tribal Consultations with tribes to honor the government-to-government relationship with Native nations. Other reasons include safeguarding the civil rights of American Indians and Alaska Natives, discussing data collection and analysis of data related to tribes and tribal people, and addressing any action or decision of the law enforcement agency that may impact a tribe or its people.⁵

Fundamental Reasons

- Honor the government-to-government relationship between federal, state, and local institutions and Native nations.⁵
- Safeguard the civil rights of American Indians and Alaska Natives.⁵
- Ensure law enforcement agencies understand tribal self-determination, tribal autonomy, and that tribal problems generally are best addressed by tribal solutions, including solutions informed by tribal traditions and customs.⁵
- Protect American Indian and Alaska Native people from violence and exposure to violence.⁵
- Work with tribes to hold perpetrators accountable, to protect victims, and to reduce the incidence of domestic violence, sexual assault, and child abuse and neglect in tribal communities.⁵
- Protect tribal treaty rights, tribal lands and natural resources, and tribal jurisdiction through litigation, where appropriate, and to handle litigation involving tribes in a manner that is mindful of the government-to-government relationship.⁵

Data Implications

Law enforcement agencies work with data daily and they must collect accurate and relevant data to enable law enforcement agencies and tribes to understand the scope of crime-related issues and make meaningful, data-driven decisions. Tribal Consultations are a place where law enforcement agencies and Native nations can discuss any issues related to the collection and analysis of data from tribes regarding crime in Indian Country⁶ and establish what kind of data need to be gathered and reported so Native nations can better address the issue of disproportionate violence against Native peoples.

Tribal consultations also provide a space for the law enforcement agency and tribe to determine what information the tribe requests from the county, ensure data that is collected on tribal members flow back to the tribe, discuss what data related to American Indian and Alaska Native people should be released publicly and what should not be released publicly, and establish lines of communications and create a data-sharing agreement (DSA) or Memorandum of Understanding (MOU).

Conducting a Tribal Consultation provides a place for a law enforcement agency to respect Indigenous Data Sovereignty—the right of a nation to govern the collection, ownership, and application of its own data. This term derives from the tribe’s inherent rights as a sovereign nation and is essential to understanding the importance of reviewing data collection and analysis practices at a Tribal Consultation.⁷

When should you have a Tribal Consultation?

A Tribal Consultation should occur when a project, program, action, etc. may affect tribal lands, people, or interests.

- **It is the non-tribal entity’s job to do as much work as necessary to determine the tribal interests that may be affected by any given project, even if the project is not taking place on federally designated tribal land.**
- The National Historic Preservation Act Section 106 regulations (36 CFR Part 800.15) direct federal agencies to make a “reasonable and good faith” effort to identify whether there would be tribal interest in an undertaking.⁸
- It is important to consult with tribal officials throughout all stages of the process of developing regulations, programs, actions, etc.

Who should be present at a Tribal Consultation?

- Tribal Council or other types of elected officials that speak on behalf of the well-being of the tribe
- The leaders and decision-makers of the non-tribal entity

A formal consultation must include the most senior leaders of each party. Ensuring appropriate staff members are present at initial and, if necessary, follow-up meetings with tribal governments, shows a commitment to the government-to-government relationship. Consultations with tribal council officials and tribal program staff should, if possible, be conducted between the same levels of officials.⁹

What is the process for requesting and holding a Tribal Consultation?

1. Identify the action that requires a Tribal Consultation.
2. Identify the affected and potentially affected tribes.
3. Determine if a Tribal Consultation Agreement has already been established between the state or local agency and a tribe
 - a. Follow the policies and procedures outlined in this agreement, if so.
4. Request a Tribal Consultation through designated communication channels.
 - a. This could be through an officially designated liaison, a “Dear Tribal Leader” letter, a governing board, or some other means as determined with local tribes.
5. Determine the method(s) in which communication will happen between non-tribal agencies and tribes with the guidance of Tribal Officials.
 - a. Written correspondence, official notification, meetings, etc.
6. Schedule Consultation with the guidance of Tribal Officials.
 - a. Establishing and adhering to a formal schedule of meetings is vital.
 - b. Consult the tribe during all aspects of the activity.
7. Measure and report results and outcomes of the Consultation; develop and utilize appropriate evaluation measures.¹⁰

Tribal governments can request a Tribal Consultation from federal agencies when there is an issue or action that they wish to discuss.

References

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